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IN THE UNITED STATES DISTRICT CIRCUIT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	Cr. No.04-00194 HG-01
)	
Plaintiff,)	DEFENDANT'S MEMORANDUM IN
)	OPPOSITION TO REVOCATION OF
vs.)	SUPERVISED RELEASE; CERTIFICATE
)	OF SERVICE
DANE P. KANESHINA,)	
)	
)	Hearing Date: June 27, 2008
Defendant.)	Time: 2:15 p.m.
)	Judge: Helen Gillmor

DEFENDANT'S MEMORANDUM IN OPPOSITION TO
REVOCATION OF SUPERVISED RELEASE

The Fifth Amendment to the U.S. Constitution expressly states that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law[.]" These rights are still applicable when the Court initiates proceedings to revoke supervised release.

United States v. Leonard, 483 F.3d 635, 638 (9th Cir. 2007) (violations of supervised release, "the close kin of probation" and thus are treated identically for constitutional analyses); United States v. Hall, 419 F.3d 980, 985 n. 4 (9th Cir. 2005) ("Parole, probation, and supervised release hearings are constitutionally indistinguishable and

are analyzed in the same manner."); United States v. Weber, 451 F.3d 552, 568 n. 17 (9th Cir. 2006) (defendant retains Fifth Amendment rights when district court orders polygraph examinations as condition of supervised release) (citing United States v. Antelope, 395 F.3d 1128 (9th Cir. 2005)).

The use of a defendant's coerced or involuntary statements violate rights guaranteed by the Fifth Amendment. United States v. Segal, 549 F.2d 1293, 1299 (9th Cir. 1977) ("it would be a due process violation to use unreliable, coerced admissions.") (citing Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202 (1959)). "Both physical and psychological pressure can lead to involuntary confessions." United States v. Miller, 984 F.2d 1028, 1030 (9th Cir. 1993) (citing Blackburn v. Alabama, 361 U.S. 199, 206, 80 S.Ct. 274, 280 (1960)). "While a confession accompanied by physical violence is per se involuntary, psychological coercion provokes no per se rule." Id. (citations omitted.). A statement is the product of coercion or is involuntary when, under the totality of the circumstances, the government, including the Court, obtains the statement by physical or psychological coercion or by improper inducement so that the person's will is overcome. Beaty v. Schriro, 509 F.3d 994, 999 (9th Cir. 2007) (quoting United States v. Leon Gurrero, 847 F.2d 1363, 1365 (9th Cir. 1988)).

The totality of the circumstances surrounding Respondent's statements given in the course of a court-mandated polygraph examination will demonstrate that the statements are the product of coercion and are involuntary. Without these involuntary statements and fruit there is no basis to support revocation. See United

States v. Stoterau, 524 F.3d 988, 1004 (9th Cir. 2008) (when, during polygraph examination pursuant to terms and conditions of supervised release, defendant receives questions calling for incriminating answers, defendant may invoke Fifth Amendment rights; "[s]hould the government desire [defendant] to answer, it may afford his answers the protection of use and derivative use immunity.").

Moreover, the process in which the statements are being used is in violation of the Due Process Clause. The Supreme Court of the United States recognized that Due Process violations arise when the adjudicative function of a tribunal fuses with its investigation.

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individual poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456 (1975).

These proceedings were investigated and initiated by the Court's Probation Department. This procedure unconstitutionally fuses the District Court's adjudicative role with its investigative and prosecutorial role. Due process does not countenance courts as tribunals that bring forth an action and then decide its outcome.

The "request" submitted by the Probation Office alleged two specific violations: looking at pornography at Borders Bookstore and communicating with a

convicted felon. In the statement of facts, however, the "request" reported Respondent's statements were far beyond the grounds for the specified violations and highly likely to inflame anyone. It is difficult to imagine that the Court as finder of fact to revoke Defendant's supervised release can remain dispassionate. The use of the coerced statements in the "request" have created "an unconstitutional risk of bias." Id. The situation was exacerbated by the misleading nature of the initial "request" that incorrectly and inaccurately characterized Respondent's response to treatment. Due Process is implicated where treatment is required but good faith participation in treatment leads to punishment.

DATED: Wailuku, Hawai'i, June 19, 2008.

/s/ Philip H. Lowenthal
PHILIP H. LOWENTHAL
Attorney for Defendant
DANE P. KANESHINA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was duly served on the following, via United States Mail and via email, postage-prepaid on today's date:

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DATED: Wailuku, Hawaii, June 19, 2008.

/s/ Philip H. Lowenthal .
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